



## Caressing the Big Fish? A Critique of ICC Trial Chamber V(A)'s Decision to Grant Ruto's Request for Excusal From Continuous Presence at Trial

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## CASE COMMENT

### CARESSING THE BIG FISH? A CRITIQUE OF ICC TRIAL CHAMBER V(A)'S DECISION TO GRANT RUTO'S REQUEST FOR EXCUSAL FROM CONTINUOUS PRESENCE AT TRIAL

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## I. INTRODUCTION

In a decision relating to the situation in Kenya,<sup>1</sup> on June 18, 2013 Trial Chamber V(a) of the International Criminal Court (ICC), by majority,<sup>2</sup> granted William Ruto's request for excusal from continuous presence at trial within the limits of certain conditions.<sup>3</sup> However, these limitations were not exactly far-reaching, as Ruto is required to be present in The Hague only on a very limited number of occasions.<sup>4</sup>

Although the Trial Chamber observed that the general rule is one of continuous presence at trial, the Chamber concluded that the present case is one of "exceptional circumstances" because Ruto became the Vice President of Kenya following the March 2013 elections.<sup>5</sup> In these circumstances, the Chamber held, it was permitted to exercise its discretion under Article 64(6)(f) of the Rome Statute of the International Criminal Court to excuse the accused from continuous

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<sup>1</sup> On the Kenyan ICC cases, see further Thomas Obel Hansen, *The International Criminal Court in Kenya: Three Defining Features of a Contested Accountability Process and Their Implications for the Future of International Justice*, 18 AUSTL. J. HUM. RTS. 187 (2012); Chandra Sriram & Stephen Brown, *Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact*, 12 INT'L CRIM. L. REV. 219 (2012) (U.K.). On the Kenyan context more broadly, see, e.g., Susanne Mueller, *Dying to Win: Elections, Political Violence, and Institutional Decay in Kenya*, 29 J. CONTEMP. AFR. STUD. 99 (2011).

<sup>2</sup> For the dissenting opinion, see Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11-777-Anx2, Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial (Carbuccia, H., dissenting) (June 18, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1605796.pdf> [hereinafter "Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial (Carbuccia, H., dissenting)"].

<sup>3</sup> Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11-777, Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial, ¶ 2 (June 18, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1605793.pdf> [hereinafter "Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial"].

<sup>4</sup> The Chamber decided that Ruto must be physically present in the courtroom for the following hearings: (i) the entirety of the opening statements of all parties and participants; (ii) the entirety of the closing statements of all parties and participants; (iii) when victims present their views and concerns in person; (iv) the entirety of the delivery of judgment in the case; (v) the entirety of the sentencing hearings (if applicable); (vi) the entirety of the sentencing (if applicable); (vii) the entirety of the victim impact hearings (if applicable); (viii) the entirety of the reparation hearings (if applicable); and (ix) any other attendance directed by the Chamber. *Id.* ¶ 3. In essence, therefore, Ruto was granted the right to waive his presence at the vast majority of trial hearings, including all of those relating to examination and cross-examination of witnesses and presentation of other forms of evidence. Besides the limited amount of sessions where Ruto is required to be present, the Trial Chamber conditioned the decision when holding that Ruto's absence "must always be seen to be directed towards performance of Mr. Ruto's duties of state," and further required that Ruto file with the Registry a signed waiver. *Id.*

<sup>5</sup> *Id.* ¶¶ 49-50.

presence at trial.<sup>6</sup> Accordingly, the Trial Chamber found that because Ruto, as Vice President, has “important functions of an extraordinary dimension to perform,” he should be treated differently than other (less prominent) suspects whose continuous presence is required at trial.<sup>7</sup>

The Trial Chamber’s unprecedented decision<sup>8</sup>—which the Prosecutor was granted leave to appeal and the Appeals Chamber’s subsequently decided should be given suspensive effect pending the appeal<sup>9</sup>—deviates from the concept of equality before the law, as enshrined both in the Rome Statute and other applicable sources of law. In particular, this Comment argues, the decision relies on dubious interpretative methods which allowed the Chamber to circumvent the wording and intent of otherwise clear provisions in the Statute, notably Article 63(1) concerning the accused’s presence at trial,<sup>10</sup> and Article 27 concerning the irrelevance of official capacity and the obligation to treat all persons equally under the Statute.<sup>11</sup> By basing its decision on Ruto’s official status, the Trial Chamber may be creating a precedent to grant state officials special treatment in a Court that was intended to target those most responsible for international crimes, irrespective of their

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<sup>6</sup> *Id.* ¶ 49. Article 64(6)(f) provides that “[i]n performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary . . . [r]ule on any other relevant matters.” Rome Statute of the International Criminal Court art. 64(6)(f), July 17, 1998, 2187 U.N.T.S. 90.

<sup>7</sup> Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial, ¶ 49.

<sup>8</sup> In no other case has the Court granted state officials any forms of privileges not afforded other suspects, nor has it allowed any other accused to be absent at trial. However, in the *Bemba* case, the trial hearings continued for very short periods in the accused’s absence while he was undergoing medical treatment. *See, e.g.*, Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11-694, Submissions of the Common Legal Representative for Victims on the Defence Request Pursuant to Article 63(1) of the Rome Statute, ¶¶ 11-13 (Apr. 22, 2013).

<sup>9</sup> The leave to appeal was granted on July 18, 2013. *See* Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11-817, Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’ (July 18, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1620766.pdf>. By mid-October 2013, at the time when the final editing of this Comment took place, the Appeals Chamber was yet to deliver its decision. However, in a decision of August 20, 2013, the Appeals Chamber granted the Prosecutor’s request for suspensive effect, resulting that Ruto is required to be present in the courtroom until the Appeals Chamber delivers its decision. *See* Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11-862, Decision on the Request for Suspensive effect (Aug. 20, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1634623.pdf>. Further, on September 23, 2013, President Kenyatta, against whom charges have also been brought, filed a similar request to be excused from contiguous presence at trial, which Trial Chamber V(b) was yet to decide at the time when this Comment was finalized in mid-October 2013. *See* Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11-809, Defence Request for Conditional Excusal from Continuous Presence at Trial (Sept. 23, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1649093.pdf>.

<sup>10</sup> Rome Statute of the International Criminal Court, *supra* note 6, at art. 63(1).

<sup>11</sup> *Id.* at art. 27.

status or title.<sup>12</sup> Furthermore, the decision to allow Ruto's trial to take place largely in his absence will hardly contribute to victims and witnesses' confidence in the proceedings.<sup>13</sup>

## II. THE CHAMBER'S (MIS)INTERPRETATION OF ARTICLE 63

### A. Why Read The Statute As "A Whole" When the Text of Article 63(1) is Clear that the Accused Must be Present?

Article 63(1) of the Rome Statute states that "[t]he accused shall be present during the trial."<sup>14</sup> It is widely accepted that the Rome Statute, as an international treaty, must be interpreted in accordance with the general rules of treaty interpretation spelled out in the Vienna Convention on the Law of Treaties.<sup>15</sup> According to Article 31(1) of the Vienna Convention, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>16</sup> It is a basic rule of treaty interpretation that the starting point for interpreting a provision in the treaty must be taken in the text itself, while context and the treaty's object and purpose must inform its meaning.<sup>17</sup> As the

<sup>12</sup> Some have argued that crimes committed by the state, not non-state actors, ought to be the focal point for the Court. See, e.g., William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953 (2008).

<sup>13</sup> The Prosecutor alleges that the witnesses in the cases against Ruto, Joshua Sang and Uhuru Kenyatta are being intimidated and that the Government of Kenya is not living up to its obligation to cooperate with the Court. See, e.g., Kenya CitizenTV, *Witnesses Are Being Intimidated, Says ICC Prosecutor*, YOUTUBE (Feb. 17, 2013), <http://www.youtube.com/watch?v=GS7Mna5MDno>. See further *infra* Part IV.

<sup>14</sup> Rome Statute of the International Criminal Court, *supra* note 6, at art. 63(1).

<sup>15</sup> The Appeals Chamber has emphasized the relevance of the provisions relating to interpretation of treaties in the Vienna Convention and clarified their meaning as follows:

The Appeals Chamber shall not advert to the definition of good faith, save to mention that it is linked to what follows and that is the wording of the Statute. The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purpose from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.

See *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ¶ 33 (July 13, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc183558.pdf>.

<sup>16</sup> Vienna Convention on the Law of Treaties art. 31(1), May 22, 1969, 1155 U.N.T.S. 331.

<sup>17</sup> See, e.g., David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565, 578 (2010).

International Law Commission has noted, “the text must be presumed to be the authentic expression of the intentions of the parties [and] . . . the starting point of interpretation is the elucidation of the meaning of the text.”<sup>18</sup> Few would dispute that the ordinary meaning of the words “shall be present during the trial” is that the trial *shall* (as opposed to *can*) take place with the accused being *present* (as opposed to being *absent*). Keeping in mind the clear text of Article 63(1), how then did the Trial Chamber manage to reach a conclusion that Ruto does *not* need to be present at the vast majority of trial hearings?

One technique utilized by the Chamber was to start with a reading of the Rome Statute “as a whole,” as opposed to first looking at the text of Article 63(1).<sup>19</sup> In reading the Statute as a whole, the Chamber observed that it becomes evident that, besides Articles 63 and 27, the other provisions that “will have to be accommodated in the resolution of this matter” are Articles 66 (concerning the presumption of innocence) and 64 (concerning the powers of the Trial Chamber).<sup>20</sup> With respect to the latter, the Chamber emphasized that Article 64(6)(f) gives the Chamber the powers to “[r]ule on any other relevant matter.”<sup>21</sup> However, if the Chamber’s powers under Article 64(6)(f) can justify a clear departure from the text of any provision that pertains to the trial, the drafters of the Statute would have needed to write only one single provision relating to the trial, namely Article 64(6)(f) with its implied all-encompassing powers of the Trial Chamber.

Furthermore, it is not clear to what extent the Chamber actually read the Statute “as a whole.” Notably, when supposedly reading the Statute as a whole, the Chamber did not examine Article 63(1) in light of Article 63(2),<sup>22</sup> which is the only provision in the Statute that explicitly deals with the Trial Chamber’s powers concerning the accused’s presence in the court room during trial and makes it clear that the circumstances have to be both exceptional and concern the particular situation where the accused disrupts the trial:

<sup>18</sup> See *Report of the International Law Commission on the Work of the Second Part of Its Seventh Session*, [1966] 2 Y.B. Int’l L. Comm’n 169, 220, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

<sup>19</sup> Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial, at ¶¶ 31-33.

<sup>20</sup> *Id.* ¶¶ 32-33.

<sup>21</sup> *Id.* ¶ 33.

<sup>22</sup> However, later on its analysis, the Chamber examined the question of whether Article 63(2) should be understood in accordance with the *expressio unius* maxim, whereby a combined reading of Articles 63(2) and 61(2) would have implied that the Chamber can only exempt the accused from presence in instances where the Chamber acts in accordance with Article 63(2). The Chamber dismissed the arguments made by Prosecutor and the Legal Representative for Victims in this regard as “unpersuasive.” *Id.* ¶¶ 54-57.

If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.<sup>23</sup>

*B. How the Duty to be Present at Trial Became a Right that Can be Waived*

The Chamber's reasoning was further premised on the Statute entailing a *right* of the accused to be present, combined with the existence of a rule in customary international law—which the Chamber held should inform the reading of Article 63(1)—that the accused has the option of waiving this right.<sup>24</sup> While the first part of the argument concerning the existence of a right to be present at trial follows clearly from the text of Article 67(1)(d) of the Statute,<sup>25</sup> the second part concerning the need to take into account a possible rule of customary international law concerning a right to waive the right to be present at a trial is certainly not self-evident. In contrast with several other provisions in the Statute that also create rights for the accused,<sup>26</sup> Article 67(1)(d)<sup>27</sup> relating to the accused's right to be present does not stipulate that the accused can waive this right. In other words, as pointed out by the Prosecutor in her observations on Ruto's request, "the drafters of the

<sup>23</sup> Rome Statute of the International Criminal Court, *supra* note 6, at art. 63(2).

<sup>24</sup> Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial, ¶¶ 34-37. Essentially, the Chamber argued that there is a rule in customary international law that allows the accused to waive the right to be present, and that the drafters of the Rome Statute "indicated no clear intention to exclude this international legal norm from reasonably influencing the interpretation and application of the Statute in the relevant respect." *Id.* ¶ 37.

<sup>25</sup> Article 67(1)(d), which the Chamber cited in this regard, states that "the accused shall be entitled to . . . minimum guarantees . . .," including a guarantee to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it . . . .

Rome Statute of the International Criminal Court, *supra* note 6, at art. 67(1)(d).

<sup>26</sup> Article 55(2)(d), for example, stipulates that a suspect has the right "[t]o be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel." *Id.* at art. 55(2)(d).

<sup>27</sup> *Id.* at art. 67(1)(d).

Statute knew how to make the presence of the accused waivable,”<sup>28</sup> but unlike in the case of the confirmation hearing,<sup>29</sup> they chose not to make the presence at trial waivable.<sup>30</sup> The reason for this is obvious: namely, that besides the right to be present spelled out in Article 67(1)(d),<sup>31</sup> Article 63(1) additionally stipulates that the accused *shall* be present at trial.<sup>32</sup> Needless to say, whereas some rights can be waived, obligations certainly cannot, or in simpler terms: if the presence at trial is both a right and a duty of the accused, it is self-evident that it cannot be waived.

Furthermore, the Chamber’s reliance on customary international law, as supposedly indicated by the jurisprudence of other international tribunals, concerning an entitlement to waive the right to be present<sup>33</sup> is methodologically dubious. Regardless of whether customary international is actually settled on the accused’s entitlement to waive the

<sup>28</sup> Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11-713, Prosecution’s Observations on ‘Defence Request pursuant to Article 63(1) of the Rome Statute,’ ¶ 8 (May 1, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1587847.pdf>.

<sup>29</sup> Article 61(2)(a) stipulates that the accused may waive his or her right to be present at the confirmation hearing. Rome Statute of the International Criminal Court, *supra* note 6, at art. 61(2). This difference between the confirmation hearings and the trial hearings was also emphasized by dissenting Judge Herrera Carbuca, who further took note that Rules 123, 124, 125 and 126 of the Rules of Procedure and Evidence include detailed provisions setting out a “strict legal framework in which the confirmation of charges can be held in the absence of the suspect,” but that no such provisions exist for the trial hearings because this is ruled out by Article 63. See Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial, ¶ 5 (Carbuca, H., dissenting).

<sup>30</sup> An important reason why not all fair trial rights can be waived is that some rights are not only intended to protect the accused, but also designed to protect other interests, such as the integrity of the justice system itself. For example, Article 67(c) of the Rome Statute provides the accused with the right to be tried “without undue delay” and Article 67(i) provides the accused with the right not to have imposed on him or her any reversal of the burden of proof. Rome Statute of the International Criminal Court, *supra* note 6, at art. 67. As noted by the Prosecutor, “nobody would argue, however, that the Accused could simply waive these rights and obtain a trial with undue delay and a reversal of the burden of proof.” Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11-713, Prosecution’s Observations on ‘Defence Request pursuant to Article 63 (1) of the Rome Statute,’ ¶ 10 (May 1, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1587847.pdf>.

<sup>31</sup> Rome Statute of the International Criminal Court, *supra* note 6, at art. 67(1)(d).

<sup>32</sup> *Id.* at art. 63(1).

<sup>33</sup> Having analyzed the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) and the European Court of Human Rights (ECHR), the Chamber concluded “that the right to presence can be voluntarily waived is a settled proposition in international law.” Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial, ¶ 37. Notably, the Chamber observed that according to the ICTR Appeals Chamber, the right to be present “is clearly aimed at protecting the accused from any outside interference which would prevent him from effectively participating in his own trial; it cannot be violated when the accused has voluntarily chosen to waive it.” *Id.*



right to be present, customary international law has little relevance for the interpretation of Article 63(1). According to Article 21 of the Rome Statute, the Statute itself (and the Elements of Crimes and the Rules of Procedure and Evidence) are the primary sources of law at the ICC, whereas the “principles and rules of international law” are only subsidiary sources.<sup>34</sup> As Judge van den Wyngaert pointed out in a recent opinion,<sup>35</sup> the Court’s jurisprudence has made it clear that customary international law is a subsidiary source, which may only be relied upon by the Chambers when there is a “lacuna in the Statute, Rules of Procedure and Evidence or Elements of Crimes,” and “[t]o determine whether such a lacuna exists, the Court must first apply the applicable rules of interpretation, as provided for by the Statute and the Vienna Convention on the Law of Treaties.”<sup>36</sup> However, in this instance there is no lacuna in the Statute since—unlike the International Criminal Tribunal for Rwanda (ICTR) Statute<sup>37</sup>—it contains a provision which clearly establishes that the accused “shall be present during the trial.”<sup>38</sup>

In other words, if one accepts that besides the provision for the accused’s *right* to be present in Article 67(1)(d), Article 63(1) imposes a *duty* that the accused be present at trial, it certainly takes an innovative approach to the interpretation of the Statute to say that a (possible) rule of customary international law concerning the accused’s entitlement to waive the *right* to be present should influence “the interpretation and application” of Article 63(1)’s *duty* to be present, as the Trial Chamber argues.<sup>39</sup>

<sup>34</sup> Rome Statute of the International Criminal Court, *supra* note 6, at art. 21.

<sup>35</sup> Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/12-4, Concurring Opinion of Judge Christine Van den Wyngaert, (Dec. 18, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1529537.pdf>.

<sup>36</sup> *Id.* ¶ 10. See similarly Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 44 (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf>; see also Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-168, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s (March 31, 2006) Decision Denying Leave to Appeal, (July 13, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc183558.pdf>.

<sup>37</sup> Whereas Article 20(4)(d) of the ICTR Statute stipulates that the accused “shall be entitled to” be tried in his or her presence (and thus resembles Article 67(1)(d) of the Rome Statute), the ICTR Statute does not contain a provision stipulating that the accused “shall” be present at trial. See Statute of the International Criminal Tribunal for Rwanda, adopted by UN Security Council Resolution 955 (1994).

<sup>38</sup> Rome Statute of the International Criminal Court, *supra* note 6, at art. 63(1).

<sup>39</sup> See Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial, ¶ 37.

*C. A Duty for the Accused to be Present, But No Obligation for the Trial Chamber to Enforce the Duty?*

The Trial Chamber further supported its departure from the text of Article 63(1) by arguing that while the provision does lay down a general obligation for the *accused* to be present at trial,<sup>40</sup> this obligation does not extend to the *Chamber*.<sup>41</sup> To support this reading, the Trial Chamber noted that in so much as the drafters had wished to create a duty for the Chamber, they should explicitly have mentioned that Trial Chambers are under a duty to ensure that trials take place only in the presence of the accused.<sup>42</sup>

With this reading, the Chamber would seem to suggest that when the Statute establishes duties, but the Chamber itself is not explicitly mentioned as a duty-bearer, it is by no means bound to enforce that duty, but may indeed nullify it at its discretion. Such an interpretation of the Statute is far-reaching and stands in contrast to the logic of legal drafting. By way of example, when Article 54(1)(c) stipulates that “[t]he Prosecutor shall . . . [f]ully respect the rights of persons arising under this Statute,”<sup>43</sup> does this then mean that in a given case the Chamber may decide that the Prosecutor *shall not* respect the rights of the accused simply because the provision mentions only the Prosecutor, not the Chamber, as a duty-bearer? Or when Article 86 lays down a general duty (using the word “shall”) for States Parties to cooperate with the Court,<sup>44</sup> is the Chamber then authorized to decide that a particular State Party *shall not* cooperate with the Court in so far as the text of the provision only indicates that the duty to cooperate falls upon State Parties?

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<sup>40</sup> *Id.* ¶ 39.

<sup>41</sup> *Id.* ¶¶ 42-43. The Chamber observed, *inter alia*, that “the plain wording of Article 63(1) and the Statute taken as a whole make the accused the subject of the duty in question,” not the Chamber. *Id.* ¶ 42.

<sup>42</sup> *Id.* ¶ 43 (noting that “[h]ad the drafter intended Article 63(1) to impose such a duty on the Trial Chamber, it would not have been too difficult for the provision to have been worded in the prohibitory model of either rule 60(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone or [sic] 92(1) of the Criminal Procedure (Scotland) Act of 1995 as amended, each of which expresses itself in language that so clearly imposes a general restraint on the court against proceeding in the absence of the accused; by prohibiting the trial as an action the court alone can take, while exceptionally preserving the discretion of the court to proceed in the absence of the accused under certain conditions.”).

<sup>43</sup> Rome Statute of the International Criminal Court, *supra* note 6, at art. 54(1)(c).

<sup>44</sup> *Id.* at art. 86.

*D. "Overlooking" the Intentions of the Drafters*

The Trial Chamber's conclusion that in "exceptional circumstances" it may exercise its discretion under Article 64(6)(f) of the Statute to excuse an accused from continuous presence at trial,<sup>45</sup> also runs contrary to the intentions of the drafters of the Statute, which is perhaps why the Chamber's otherwise rich assessment of sources conveniently avoids a discussion of the drafting history of Article 63.

A brief summary of the drafting history clearly shows that the drafters did indeed contemplate various situations where the Trial Chamber could commence or continue the trial in the accused's absence—including the possibility that one of parties would request the Chamber that the trial take place in the accused's absence—but in the end decided against such forms on trials (other than the particular situation mentioned in Article 63(2) where the accused continues to disturb the trial and the Chamber removes him or her). Article 44(1)(h) of the 1993 Draft Statute of the International Law Commission required the accused "to be present at the trial, unless the Court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate."<sup>46</sup> Subsequently, within the Working Group on a Draft Statute for an International Criminal Court, there had been considerable debate on the question of whether, and if so, under what circumstances the Statute should allow for trials in the accused's absence.<sup>47</sup> In the Final Report of the Preparatory Committee, it was recognized that "three options regarding trials in absentia . . . have emerged to date, in addition to the ILC draft,"<sup>48</sup> including various options whereby the Trial Chamber, in exceptional circumstances, would be granted the authority to order that the trial takes place in the

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<sup>45</sup> Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial, ¶ 49.

<sup>46</sup> *Report of the Int'l Law Comm'n, 45<sup>th</sup> Sess., May 3—July 23, 1993*, 2 U.N. GAOR Supp. No. 10, at 120, U.N. Doc. No. A/48/10, *extract from* 48 Y.B. Int'l L. Comm'n.

<sup>47</sup> According to some members, any form of trial in the accused's absence was "completely unacceptable from the perspective of a fair trial which respects the fundamental rights of the accused." *Id.* These members also felt "that judgements by the Court without the actual possibility of implementing them might lead to a progressive loss of its authority and effectiveness in the eyes of the public." *Id.* Other members, however, "were strongly in favour of drawing some distinctions," whereby trials *in absentia* should not be allowed where the accused "has been indicted but is totally unaware of the proceedings," but could be allowed where the accused "has been duly notified but chooses not to appear before the Court" and where the accused "has already been arrested but escapes before the trial is completed." *Id.*

<sup>48</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 99, U.N. Doc. No. A/CONF.183/2/Add.1, Addendum (Apr. 14, 1998) (discussing Article 63).

absence of the accused.<sup>49</sup>

However, as Håkan Friman notes in his detailed account of the negotiation process on the topic, in the end “it was obvious that time constraints and the persistent lack of common ground would not allow the Working Group to find a compromise solution on trial *in absentia*,” and “in order to avoid making this legal-technical question an issue in the final negotiations on the Statute, the major stakeholders in the debate agreed on confirmation hearings as drafted in the working paper, replacing all forms of trial *in absentia*.”<sup>50</sup> Accordingly, “[p]aragraph 3 of Article 63, dealing with trial *in absentia*, was dropped altogether and, thus, the Statute does not provide for any such trials to take place before the Court.”<sup>51</sup>

In the situation before Trial Chamber V(a), the preparatory work therefore clearly confirms that the text of Article 63 should be understood to entail an obligation that the Chamber ensures that the trial take place in Ruto’s presence.<sup>52</sup>

### III. THE CHAMBER’S (MIS)INTERPRETATION OF ARTICLE 27

#### *A. How the Chamber Found that the Requirement of Equal Application of the Law Means that the Law Shall Not Necessarily be Applied Equally*

Article 27 of the Rome Statute, concerning the irrelevance of official capacity, provides that:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such

<sup>49</sup> *Id.* at 100-03 (discussing the various options concerning Article 63).

<sup>50</sup> Håkan Friman, *Rights of Persons Suspected or Accused of a Crime*, in THE MAKING OF THE ROME STATUTE 247, 261 (Roy S. Lee ed., 1999).

<sup>51</sup> *Id.*

<sup>52</sup> Although the preparatory work is only a supplementary means of interpreting treaties, it may be used to “confirm the meaning” resulting from the application of the primary methods of treaty interpretation mentioned in Article 31 of the Vienna Convention on the Law of Treaties.

a person.<sup>53</sup>

It is difficult to see how the Chamber's conclusion that "the exceptional circumstances" that in its view make an accused's excusal from presence at trial acceptable "include situations in which an accused person has important functions of an extraordinary dimension to perform"—which in the specific case related to "the functions of the Deputy President of Kenya"<sup>54</sup>—can be compatible with the first sentence of Article 27(1). In fact, the Chamber itself seemed to wonder when noting:

The first sentence of the provision—i.e. that the Statute "shall apply equally to all persons without any distinction based on official capacity"—necessarily provokes the question whether the accused's request for excusal from the duty to be present during the trial may be properly granted to him on the grounds that he requires the indulgence in order to permit him to perform the duties of his office as Deputy President of Kenya.<sup>55</sup>

However, the Trial Chamber also claimed to have an answer to the question as it held that the "correct answer to the question will begin with an appreciation of the object of the provision, notwithstanding isolated words and phrases employed to effectuate it."<sup>56</sup> In this regard, the Chamber suggested that the main aim of Article 27(1) is to align the ICC Statute with the contemporary norm of international law, according to which public officials are no longer entitled to immunity for violation of international criminal law.<sup>57</sup>

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<sup>53</sup> Rome Statute of the International Criminal Court, *supra* note 6, at art. 27.

<sup>54</sup> Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial, ¶¶ 49-51. The Chamber further elaborated that such extraordinary functions that warrant excusal would not include "ones that many people are in a position to perform at the same time and in the same sphere of operation." *Id.* ¶ 49. With regard to the conditions of the specific case, the Chamber stated its view that "the demands of the office of the executive vice president of a State may meet the requirements of the test, depending on what those functions are." *Id.* ¶ 50. In this regard, the Chamber emphasised that "few tasks are more important and extraordinary in their dimension as to have a principal role in the management of the affairs and destiny of a State and all its people, and their relationship with the world, for any period of time," and further noted that "how well or correctly a particular incumbent performs those functions is a separate question that should not encumber the need to permit that incumbent reasonable room in the first place to discharge those functions in the right way." *Id.*

<sup>55</sup> *Id.* ¶ 65.

<sup>56</sup> *Id.* ¶ 66.

<sup>57</sup> *Id.* The Chamber further elaborated:

Article 27 is mainly intended to accomplish (i) the (now usual) removal of immunity from jurisdiction on grounds of official position; and (ii) the removal of any special immunity or procedure that impedes effective exercise of jurisdiction of the Court over a public office holder in relation to his individual criminal responsibility.

*Id.* ¶ 70.

Notwithstanding the importance of understanding the object of a provision, the rules of treaty interpretation do not permit the Chamber to completely circumvent the text of a provision merely because doing so may not necessarily run counter to one of the objectives of the provision. Still, this is seemingly what the Chamber admitted to doing when stating that it did not “consider that the object of Article 27 is offended or wholly defeated merely by allowing Mr. Ruto to be excused from continuous presence at his trial in order to permit him to carry out the essential functions of the Deputy President of Kenya.”<sup>58</sup> Put otherwise, the Chamber implies that it is acceptable to rule in a manner that contravenes the wording of a provision—in this case, the provision of Article 27 that states that the “Statute shall apply equally to all persons without any distinction based on official capacity”<sup>59</sup>—so long as the purpose of the provision is not “wholly defeated”. Again, this is certainly a peculiar variant of teleological interpretation, which would have far-reaching consequences if applied in other contexts.<sup>60</sup> In fact, if one follows the Chamber’s reasoning there would have been no reason for the drafters to adopt a statutory framework with detailed regulations, as they could simply have stated their main intentions and left it to the Chambers to develop the law.

What is more, the Chamber’s reasoning is problematic because provisions in the Statute rarely serve one goal only. While there can be little doubt that the Chamber is right in observing that a *main* goal of Article 27 is to ensure that the rules in customary international law concerning immunity are not a barrier to criminal prosecutions before the ICC, the use of the words “in particular”<sup>61</sup> with respect to not exempting any person from criminal responsibility regardless of their status indicates that this is an important, but not the only, objective of

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<sup>58</sup> *Id.* ¶ 71. The Chamber further observed that “[t]he object of Article 27 is not to remove from the Trial Chamber all discretion to excuse an accused from continuous presence in an ongoing trial, when the excusal is recommended by the functions implicit in the office that he or she occupies.” *Id.* Using this very specific formulation of what is *not* the object of Article 27, the Chamber appears to confuse the *object* of the law with the *application* of the law. In other words, the object of Article 27 is obviously not to prevent that the Chamber allow a prominent official to be absent at trial, but as argued in this Comment, one of the objectives of the provision is that all suspects are treated equally, an object which is defied by the Chamber’s ruling.

<sup>59</sup> Rome Statute of the International Criminal Court, *supra* note 6, at art. 27(1).

<sup>60</sup> By way of example, a main purpose of Article 15 of the Rome Statute granting the Prosecutor the powers to initiate an investigation *proprio motu* is to create a strong and independent Office of the Prosecutor. This object of the provision would therefore not be “wholly defeated” (but quite on the contrary strengthened) if the Court ruled that the text of Articles 15(3) and (4), according to which the Prosecutor must obtain an authorization of the Pre-Trial Chamber to commence such an investigation, simply does not apply.

<sup>61</sup> *Id.*

the provision.<sup>62</sup> Indeed, the first sentence in Article 27(1) concerning equal application of the law appears to align the provision with the general prohibition against discrimination and against applying the Statute differently on grounds of a person's status, as stipulated in Article 21(3) of the Statute.<sup>63</sup>

*B. The Search for Support in the Broader Framework of International Law*

Perhaps realizing the controversial nature of its conclusion that an assessment of the object of Article 27 permits the Chamber to apply the Statute differently with respect to persons who perform "important functions," the Chamber also sought to justify its decision to grant Ruto's request with reference to rules in the broader framework of international law.<sup>64</sup> First, the Trial Chamber found that "international law's recognition of democracy when not held up as a shield against inquiries into individual criminal responsibility of elected public officers" was of "particular interest" for understanding what it referred to as an "unusual situation" before the Chamber, where the prosecution of an accused person in his individual capacity was seen to collide with

<sup>62</sup> In other words, if avoiding that state officials be immune from criminal prosecutions was the *only* objective of Article 27, it would have served no purpose whatsoever that the drafters included the first sentence of Article 27(1). Indeed, the observation that there are other objectives of Article 27 is supported by the Court's limited jurisprudence on the provision. In its decision to issue a warrant of arrest for Omar al-Bashir, Pre-Trial Chamber I held that Article 27(1) and (2) of the Statute provide for three "core principles":

(i) "This Statute shall apply equally to all persons without any distinction based on official capacity;" (ii) "[...] official capacity as a Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence"; and (iii) "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 43 (Mar. 4, 2009).

<sup>63</sup> Article 21(3) reads:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Rome Statute of the International Criminal Court, *supra* note 6, at art. 21(3). Judge Herrera Carbuca makes a similar point in her dissent. Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial, ¶ 7 (Carbuca, H., dissenting).

<sup>64</sup> Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial, ¶ 79.

the “reality that the same person has in the meantime become the incumbent Deputy President of his country.”<sup>65</sup> However, the treatment of democracy in international law does not articulate that elected officials should be given special treatment in courts of law, nor do these rules, as the Chamber claims, make up a strand which is “self-contained and independent in its ability to resolve the litigation.”<sup>66</sup> Quite on the contrary, as noted above, the principles and rules of international law are to be applied only when the Statute and the other primary sources of law do not provide an answer.<sup>67</sup>

Second, the Chamber found that Ruto’s application provoked questions “concerning the accommodation that international law permits Heads of State and Governments and senior state officials.”<sup>68</sup> The Chamber held that the chief object of such accommodation is to protect the individual concerned against any act which would unduly hinder him or her in the performance of his or her duties on behalf of his or her state, and that “it is for that reason that such officials are granted immunity from the criminal or civil processes of other States.”<sup>69</sup> Although the Chamber took note that “it is now firmly settled that accommodations to office holders no longer may go so far as to permit such officials immunity from the jurisdictions of international criminal courts,”<sup>70</sup> it also held that “there is no reason to over-task the principle captured in Article 27, especially in a manner that places it on a needless collision course with other valid norms of international law.”<sup>71</sup>

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<sup>65</sup> *Id.* ¶¶ 79-80.

<sup>66</sup> *Id.* ¶ 26. At the outset of its analysis, the Chamber had observed that there are “two distinct strands of reasoning that recommend themselves for the present decision,” with each of them being “self-contained and independent in its ability to resolve the litigation.” *Id.* Whereas the first strand of reasoning related to the Statute itself, the Chamber observed that “the second strand of reasoning engages considerations of international law beyond the obvious provisions of the ICC Statute.” *Id.* In the end, however, the Chamber observed that when there is a “perceived conflict between the two norms, considerations of democracy must yield to the need to conduct proper inquiry into criminal responsibility of an elected official for crimes against humanity.” *Id.* ¶ 90.

<sup>67</sup> Assessing the “democracy argument,” the Chamber also found it necessary to examine how Kenya’s Constitution treats the issue of immunity. *Id.* ¶ 82. Whereas this assessment led the Chamber to conclude that “it is eminently clear that the Constitution of Kenya and the ICC Statute are perfectly in harmony in their agreement that Mr Ruto must stand trial, as charged, even though he is the Deputy President of Kenya,” one is of course left wondering why the Chamber deems it necessary to undertake an examination of Kenya’s constitutional order, and what might have been the implications had Kenya’s Constitution *not* accepted that the Vice President can be prosecuted before the ICC. *Id.*

<sup>68</sup> *Id.* ¶ 91.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* ¶ 92.

<sup>71</sup> *Id.* ¶ 95.



Such collusion would occur, the Chamber held, “if Article 27 is applied in a manner that denies the citizens of a State the dividends of their democratic entitlement to elect whom they want into the executive presidency of their country, when such an entitlement was not corrupted by proof of guilt of the candidate, as such.”<sup>72</sup> However, it is not clear why requiring Ruto to be present at trial, as stipulated in Article 63(1), would have meant that Kenyans were denied the “dividends of their democratic entitlement,” especially, one might add, given that Ruto was already indicted at the point of the election and had stated his intent to stand trial in The Hague.<sup>73</sup> It is no less difficult to understand why the Chamber believes that Article 27 would have been “over-tasked” by simply applying the principle of equality before the law, as follows from the first sentence of the provision.<sup>74</sup>

Finally, one aspect of international law is curiously missing from the Chamber’s otherwise comprehensive analysis of international law instruments. Although Article 21(3) entails a specific prohibition against discrimination and explicitly requires the Court to apply and interpret the Statute in a manner “consistent with internationally recognized human rights,” the Chamber did not take into account that virtually every single international human rights treaty contains a clause prohibiting discrimination and that equality before the law is a well-settled principle in international human rights law.<sup>75</sup>

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<sup>72</sup> *Id.* Accordingly, the Chamber concluded that to apply Article 27 in a manner that eliminates all the legitimate interests outlined above, notwithstanding that they do not truly threaten the undisputed jurisdiction of the Court to continue with the inquiry into the individual criminal responsibility of the accused, becomes inconsistent with the traditional views of justice correctly observed “as maintaining or restoring a balance or proportion.”

*Id.* ¶ 97. The Chamber additionally observed that “perhaps, the clearest indication that Article 27 may not have been aimed at nullifying the traditional rules of international law” with respect to immunity of state officials is that Article 27(2) does not proclaim the abolishment of “all immunities and special procedures” that attaches to official capacity under national or international law. *Id.* ¶ 98.

<sup>73</sup> The charges against Ruto were confirmed on January 23, 2013. *See* Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf>. On various occasions during the campaigning period, Ruto and Kenyatta stated that they would continue to cooperate with the ICC, but following their election the signals have been mixed. *See further* Thomas Obel Hansen, *Kenyatta in State House: What’s Next for Kenya and the ICC?*, OPEN DEMOCRACY (Apr. 2013), <http://www.opendemocracy.net/opensecurity/thomas-obel-hansen/kenyatta-in-state-house-whats-next-for-kenya-and-icc>.

<sup>74</sup> Decision on Mr. Ruto’s Request for Excusal from Continuous Presence at Trial, ¶ 95.

<sup>75</sup> By way of example, Article 1 of the Universal Declaration of Human Rights provides that “[a]ll human beings are born free and equal in dignity and rights.” Universal Declaration of

It is, to put it mildly, difficult to see how the Chamber's interpretation whereby a person who "has important functions of an extraordinary dimension to perform" can be excused from trial but a person who has less important functions is bound to be present at trial could possibly be said to comply with the standards of equality before the law.<sup>76</sup> By way of example, should Ruto's co-accused, Joshua Sang, dare to make a similar application, it is bound to fail under the Chamber's test as he is a radio broadcaster and thus, unlike Ruto, performs functions which in the Chamber's words "many people are in a position to perform at the same time and in the same sphere of operation."<sup>77</sup>

#### IV. REFLECTIONS

Unless Trial Chamber V(a)'s decision is overturned by the Appeals Chamber, the decision to grant Ruto's request for excusal from continuous presence at trial could create a precedent for treating the Court's suspects differently based on their official status.<sup>78</sup> While the Chamber suggested that the present decision would not necessarily set precedent due to its "peculiar" nature arising from Ruto's "duties of state,"<sup>79</sup> it seems more likely that given the types of cases addressed by

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Human Rights art. 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Article 7 of the Universal Declaration of Human Rights holds that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law." *Id.* at art. 7. Article 14(1) of the International Covenant on Civil and Political Rights stipulates that "[a]ll persons shall be equal before the courts and tribunals." International Covenant on Civil and Political Rights art. 14(1), Dec. 16 1966, 999 U.N.T.S. 171. Article 26 of the same covenant stipulates that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." *Id.* at art. 26. As Rhona Smith notes, equality before the law requires that all individuals are to be "viewed in law in a non-discriminatory manner, especially with respect to the judicial determination of their rights and freedoms . . . ." RHONA K. SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS 235 (3d ed. 2007). On the importance of the principles of non-discrimination and equality before the law in international human rights law, *see further id.* 175-93, 235-53.

<sup>76</sup> *See similarly* Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11-777-Anx2, Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial, ¶ 7 (Carbuccia, H., dissenting) (noting that pursuant to internationally recognized human rights, "all persons shall be equal before courts and tribunals and no accused should be accorded privileged treatment, as equality under the law is a fundamental value of the administration of justice").

<sup>77</sup> These were the standards established by the Trial Chamber. Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial, ¶ 49.

<sup>78</sup> As the Trial Chamber itself acknowledged, "decisions establish the framework of judicial precedents for subsequent cases that identify with the facts and circumstances of earlier cases." *Id.* ¶ 27.

<sup>79</sup> *Id.*

the Court, there will be no end to this type of request.<sup>80</sup> The Trial Chamber has opened the door to treating prominent officials in a privileged manner, and future defendants who are involved in the business of government are likely to make applications to obtain special treatment, citing Trial Chamber V(a)'s decision.

This is likely to have a negative effect on how the public—and in particular the victims—perceive the Court.<sup>81</sup> While the Trial Chamber remarked that the argument made by the Prosecutor and the Legal Representative for Victims that the accused's absence at trial would have a negative impact on how the Court is perceived was an “unpersuasive hyperbole with no hint of empirical support,”<sup>82</sup> it takes little fantasy to imagine that the victims and witnesses in the specific case—many of whom have already been intimidated and have yet to see any political leader brought to account more than five years after the post-election violence took place<sup>83</sup>—will lose confidence in the process. The decision may also more broadly jeopardize the public's trust in the ICC as an institution capable of delivering fair and impartial justice.

Perhaps in an effort to overcome the perception that the ICC endorses “phantom” trials with “no physical reality” for political leaders,<sup>84</sup> ICC Spokesman Fadi El-Abdallah appeared in Nairobi to respond to Kenyan media's questions relating to the decision as well as other concerns relating to the trial soon after the Trial Chamber's ruling. However, El-Abdallah's assurance to Kenyans that ICC Judges “only consider the merits of an application and cannot be swayed by political

<sup>80</sup> See similarly *Prosecutor v. Ruto & Sang*, Case No. ICC-01/09-01/11-713, Prosecution's Observations on “Defence Request pursuant to Article 63 (1) of the Rome Statute”, ¶ 12 (May 1, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1587847.pdf>.

<sup>81</sup> As the Prosecutor noted with respect to the specific case, simply allowing Ruto “to drop in and attend any session that he might choose to attend, whenever it would please him . . . would undoubtedly have an extremely negative impact on how the Court is perceived by the public and more importantly the victims and witnesses.” *Id.* ¶ 11.

<sup>82</sup> Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial, ¶ 73.

<sup>83</sup> On the intimidation of victims and witnesses, see, e.g., Bernard Momanyi & Simon Jennings, *Kenya Witnesses Face Harassment*, INSTITUTE FOR WAR AND PEACE REPORTING (June 5, 2013), <http://iwpr.net/report-news/kenya-witnesses-face-harassment>. Curiously, the Trial Chamber appeared to largely ignore the question of victims and witnesses' interest in the proceedings, though the Chamber did note that the Prosecutor has repeatedly made allegations of witness and victim intimidation and interference and that these allegations are currently under investigation by the Prosecution in order to ascertain the culprits. Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial, ¶¶ 107-08.

<sup>84</sup> These were the terms used by the Legal Representative for Victims. *Prosecutor v. Ruto & Sang*, Case No. ICC-01/09-01/11-749, Submissions of the Common Legal Representative for Victims on Partial Absence of the Accused During Trial in Relation to Article 63(1) of the Rome Statute, ¶ 8 (May 22, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1595232.pdf>.

declarations [as] ICC proceedings are purely a judicial process”<sup>85</sup> likely rang hollow to some.

Discussing the likelihood of national trials for those responsible for organizing Kenya’s post-election violence, Stephen Brown and Chandra Sriram have noted that it is an unrealistic expectation that “the big fish will fry themselves.”<sup>86</sup> While Trial Chamber V(a)’s ruling could possibly be motivated by promoting the suspects’ cooperation with the Court,<sup>87</sup> it is starting to look as if the ICC might also be more interested in caressing the big fish than frying them.

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<sup>85</sup> Felix Olick, *ICC Defends Ruto’s Granted Request*, STANDARD MEDIA (June 28, 2013 5:49 PM), [http://www.standardmedia.co.ke/m/story.php?articleID=2000086986&story\\_title=ICC-defends-Rutos-granted-request](http://www.standardmedia.co.ke/m/story.php?articleID=2000086986&story_title=ICC-defends-Rutos-granted-request).

<sup>86</sup> Stephen Brown with Chandra Sriram, *The Big Fish Won’t Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya*, 111 AFR. AFF. 244, 258 (2012) (U.K.).

<sup>87</sup> So far, the suspects as well as the government of Kenya have, formally speaking, cooperated with the ICC. However, the government has taken various steps aimed at ending the cases, including an admissibility challenge and lobbying for the UN Security Council to defer (and more recently terminate) the Kenya ICC cases. *See further* Thomas Obel Hansen, *Masters of Manipulation: How the Kenyan Government is paving the Way for Non-Cooperation with the ICC*, OPEN DEMOCRACY (May 2012), <http://www.opendemocracy.net/opensecurity/thomas-obel-hansen/masters-of-manipulation-how-kenyan-government-is-paving-way-for-non->. The Prosecutor has on many occasions stated her dissatisfaction with the level of cooperation, and has further indicated that her office is extremely concerned with the level of witness intimidation in the Kenya situation. *See, e.g.*, Kenya CitizenTV, *supra* note 13.